IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.10084 OF 2004

Abdul Majid s/o. Mirza Shaikh : Petitioner
(Orig. Respondent)

V/s.

Shahnaz d/o. Abbas Ali : Respondent
(Orig. Petitioner)

...

Mr.A. H. Solkar with Mr.M. H. Bandarkar for the petitioner.
Mr.S. Akhtar for the respondent.

...

CORAM : S.A. BOBDE, J.

DATE : APRIL 28, 2005.

P.C.:

1. Rule, returnable forthwith.

Mr.Akhtar, learned counsel, appears and waives service of rule on behalf of the respondent.

Heard by consent.

2. Two decisions rendered on the same date of the Family Court, Mumbai, have been challenged by the petitioner. By the first decision, the learned Family Court has directed the petitioner-husband to pay interim maintenance at the rate of Rs.3,000/- per month to the respondent-wife and Rs.2,000/- per month to the child Amira from September 2003. The petitioner has been directed to clear the arrears in six equal monthly

instalments from the date of the order.

3. The second decision is the framing of a preliminary issue as to the jurisdiction of the Family Court. In this regard, the petitioner's grievance is that the preliminary issue ought to have been decided before directing payment of maintenance.

4. Having heard the matter for sometime, it does not appear to be a fit case to interfere. According to the petitioner, he has divorced the respondent by a talaknama which she admits as having received. The respondent has herself stated so in her petition for maintenance, but has denied the circumstances and the efficacy of the talaknama. Having regard to the evidence on record that the petitioner is having his own business of A-1 Motor Service Station at Jogeshwari and appears to be getting a regular income from other family business of S.K. Electronic at Andheri and on the basis of an estimate that the petitioner must be earning at least Rs.25,000/- to Rs.30,000/- per month, the learned Family Court has directed to pay maintenance of

Rs.3,000/- to the respondent-wife and Rs.2,000/- for their child Amira. I see no manifest error of law apparent on the face of the record to interfere with this order with regard to the maintenance.

5. The respondent claimed maintenance with effect from the date of her application for maintenance i.e., sometime in the year 2002. However, the Court has granted maintenance from September 2003. The Family Court has also permitted the petitioner to clear the arrears of maintenance in six equal monthly instalments. The petitioner has admittedly not paid the arrears. The petitioner is, therefore, hereby directed to pay the arrears in ten equal monthly instalments with effect from today, having regard to the plea of the petitioner' scounsel that the arrears have accumulated beyond the petitioner's means.

6. As regards the second point, the learned counsel for the petitioner has no grievance about the framing of the preliminary issue. As stated earlier, the submission is that the question of jurisdiction ought to have been decided before

directing payment of maintenance. There is no doubt that the plea of jurisdiction in this case is that under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, hereinafter referred to as the "Act", only a divorced woman can claim maintenance under the provisions of the Act and that according to the decision of a Full Bench of this Court in Karim Abdul Rehman Shaikh v. Shehnaz Karim Shaikh & Ors. (2000 All MR (Cri.) 1249), a divorced woman must claim maintenance under the provisions of the Act and not under any other law. This position in law, however, cannot be straightaway applied to the present case since there is a categorical denial by the respondent that she is divorced. Until that jurisdictional fact is determined, it would not be permissible to assume a lack of jurisdiction. In the circumstances of the case, I am of view that the first decision of the Family Court regarding maintenance calls for no interference since it does not suffer from any error of law apparent on the face of the record and does not appear to be *prima facie* exhorbitant. Maintenance is essential for sustenance of life itself and can be granted pending decision on the issue of

jurisdiction. As regards the second decision, I am of view that the Family Court ought not to have merely framed the issue and kept the matter lingering. A question of jurisdiction must be decided at the earliest.

7. I, therefore, direct the Family Court to decide the issue of jurisdiction within a period of three months from the date the parties appear before the Family Court. The parties are directed to appear before the Family Court on 5.5.2005. The petitioner shall make the payment under the orders of the Family Court without prejudice to his contention regarding lack of jurisdiction of that Court. The petitioner is hereby directed to pay the arrears of maintenance in ten equal monthly instalments with effect from today. In fact, Mr.Solkar, learned counsel for the petitioner, states that the petitioner is willing to make payment for the maintenance of the daughter and the petitioner shall not seek any adjustment regarding that amount.

8. Before parting with this case, it must be observed that

the parties did not agree for mediation before this Court. They are, however, free to do so even hereafter, particularly in the interests of the child.

9. In the circumstances, the rule is partly made absolute in the aforesaid terms.

Sd/-

S.A. BOBDE, J.